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Supreme Court, U.S.
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# In the
# Supreme Court of the United States

OCTOBER TERM, 1991

LAGRANGE TRADING COMPANY,
d/b/a AIRLINE BOOKSTORE
*Petitioner/Cross Respondent*

vs.

NICKY NICOLOSI,
AARON BROUSSARD,
CITY OF KENNER, LOUISIANA
*Respondents/Cross Petitioners*

Cross Petition for Writ of *Ceritorari* to the
United States Court of Appeals for the Fifth Circuit

## CROSS PETITION FOR WRIT OF *CERTIORARI*

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## QUESTION PRESENTED

Does the special permit provision of the ordinance give the City Council unbridled discretion to approve or disapprove an application to locate an adult book/video store such that it is unconstitutional as a prior restraint?

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## CROSS PETITION FOR WRIT OF *CERTIORARI*

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## OPINIONS BELOW

On January 13, 1992, the United States Court of Appeals for the Fifth Circuit affirmed without opinion the decision of the United States District Court for the Eastern District of Louisiana in this matter. The decisions are not reported. They are reproduced as Appendix A and Appendix B, respectively, to the Petition for Writ of *Certiorari* filed by LaGrange Trading Company d/b/a Airline Bookstore.

## JURISDICTION

The Petition for Writ of *Certiorari* of LaGrange Trading Company d/b/a Airline Bookstore, was received on May 11, 1992. This Cross Petition for Writ of *Certiorari* is filed pursuant to Rules 10.1(c) and 12.3 of the Rules of the Supreme Court of the United States. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances."

The City of Kenner Zoning Ordinance No. 6333 is printed as Appendix D to the Petition for Writ of *Certiorari*.

Section 23.02 of the Comprehensive Zoning Ordinance of the City of Kenner is quoted, in pertinent part, at page 6 of this Cross Petition.

## STATEMENT OF THE CASE

The City of Kenner, Louisiana, enacted Zoning Ordinance No. 6333, effective November 19, 1989, amending its Comprehensive Zoning Ordinance. The amendment, in effect, limited operation of adult book/video stores to Light and Heavy Industrial districts of the City. LaGrange

Trading Company, d/b/a Airline Bookstore, filed a Complaint for Declaratory Relief, Preliminary Injunction, Permanent Injunction and Attorneys Fees, pursuant to 42 U.S.C. §1983, challenging the constitutionality of the ordinance. The matter was submitted to the District Court for decision on stipulated facts.

The United States District Court for the Eastern District of Louisiana entered Judgment dismissing the Complaint on the ground that the ordinance was a valid, content-neutral time, place and manner zoning regulation. However, it found a provision of the ordinance requiring an adult book/video store to apply for a permit to be unconstitutional for the reason that "the permit requirement provides the Kenner City Council with unbridled discretion on whether or not to allow an adult bookstore to open." It, therefore, severed the permit requirement in approving the ordinance.

The Judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit on January 13, 1992, and, after rehearing was denied on February 12, 1992, LaGrange Trading Company filed a Petition for Writ of *Certiorari* to this Court. Respondents, the City of Kenner and its officials, file this Cross Petition for Writ of *Certiorari* contesting the severance of the permit requirement of Ordinance No. 6333.

## SUMMARY OF ARGUMENT

Permit application procedures established by the City of Kenner do not vest City officials with "unbridled discretion" in considering permit applications of adult book/video store operators so as to constitute a prior restraint on the exercise of First Amendment rights. Consideration of any application for a permit under Kenner's

Comprehensive Zoning Ordinance is limited by five guidelines consistent with substantial and legitimate governmental interests. These specific guidelines distinguish Kenner's permit procedures from those which existed in cases upon which the "unbridled discretion" rule is based. Moreover, in this case, the first four guidelines are automatically satisfied by the requirements of the zoning ordinance with respect to location of adult book/video stores. The fifth guideline requires consideration of narrow and definite governmental concerns which exist for any business establishment: safe and convenient ingress and egress, traffic flow and control, and access in case of fire. The City of Kenner's permit requirement satisfies the two prong test for constitutionality and should not have been stricken.

## REASONS FOR GRANTING THE CROSS WRIT OF *CERTIORARI*

The District Court, affirmed by the Fifth Circuit, approved City of Kenner Ordinance No. 6333,[1] except for the permit provision which was declared invalid. Sections 15.02 and 16.02 of the ordinance permit adult book/video stores to locate and operate in Light and Heavy Industrial districts of the City of Kenner "only upon approval by the City Council per Section 23.02." The District Court held that this permit provision did not meet the first prong of the constitutional test for a prior restraint on the exercise of First Amendment rights established by *FW/PBS v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). In *FW/PBS,* this Court held:

> Our cases addressing prior restraints have identified two evils that will not be tolerated in such

[1] Reproduced as Appendix D to the Petition for Writ of *Certiorari* of LaGrange Trading Company, d/b/a Airline Bookstore.

> schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."
>
> . . .
>
> Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible.
>
> . . .

*Id.*, 110 S.Ct. at 604. The District Court erred in finding that the City of Kenner's permit provision "provides the Kenner City Council with unbridled discretion on whether or not to allow an adult bookstore to open."

The District Court summarized the permit requirement contained in the ordinance as follows:

> Kenner Zoning Ordinance art. 15, subsection 15.02[2], mandates that an adult book/video store must apply for approval by the city council according to subsection 23.02. Under this provision, such application is made to the City Planning and Zoning Commission which then will hold a public hearing on the application. Under La. Rev. Stat. ann. 33:113, the Planning Commission has 60 days within which to approve or disapprove the application; otherwise, the application shall be deemed to have been approved and a certificate to that effect shall be issued by the commission on demand. Alternatively, a report from the Planning and Zoning Commission must be submitted to the City Clerk within thirty days after the date

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[2] Section 15.02 deals with Light Industrial districts. Section 16.02 contains an indentical provision relating to Heavy Industrial districts.

> of the public hearing. If not submitted, the report shall be deemed favorable. Subsection 23.02C. Thereafter, the City Council has 90 days to vote on the report. (p. A-21, et seq., Petition for Writ of *Certiorari*.)

Section 23.02 provides, in pertinent part:

> B. All requests requiring a hearing before the City Planning and Zoning Commission . . . shall be recommended by the City Planning and Zoning Commission and authorized by the City Council only when said use complies with all of the following provisions:
>
> 1.Said use is necessary to promote the public interest at that location.
>
> 2. Said use is compatible with adjacent or nearby land uses and zoning in the area.
>
> 3. Said use will not cause substantial injury to other property in the neighborhood in which it is to be located.
>
> 4. Said use is designed, located and proposed to be operated so that the public health, safety and welfare will be protected.
>
> 5. Said use had adequate ingress and egress to property and proposed structures thereon with particular attention to vehicular and pedestrian safety and convenience, traffic flow and control, and access in case of fire.

The District Court correctly found that Kenner's

permit procedures meet the time limitation requirement of *FW/PBS* because they provide time limitations for city agencies to approve or disapprove a permit request, in default of which the application is deemed approved and the permit must be issued on demand. In addition, prompt review of any decision by the City Council is available through appellate procedures. *See, Christopher Estates, Inc. v. East Baton Rouge Parish*, 413 So.2d 1336 (La.App. 1st Cir. 1982); *Inniswald-Jefferson Tera Civil Assn., Inc. v. La. Health Services and Indemnity Co., Inc.*, 396 So.2d 348 (La.App. 1st Cir. 1981). Therefore, the prior restraint issue presented for this Court's consideration is whether Kenner's permit procedures satisfy the "unbridled discretion" prong of the constitutional test.

In reaching its conclusion, the District Court did not review the cases cited by *FW/PBS* in support of the "unbridled discretion" prong of the test, nor did it consider whether the five limiting provisions of the Kenner ordinance reasonably restrained official discretion in the circumstances of this case. Either analysis reveals that the permit requirement is constitutionally valid.

The five guidelines limiting the discretion of Kenner's City Council in considering permit requests for operation of adult use businesses distinguish the Kenner ordinance from the ordinances considered in the cases cited in *FW/PBS* in support of the "unbridled discretion" test.

> In *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S.Ct. 1238, 100 L.Ed.2d 771 (1988), a city mayor was given authority to grant or deny applications for licenses to place news racks on public property. The only limitation on this authority was that if the application was denied the mayor was required "to state the reasons for such denial." *Id.*, 108 S.Ct. at 2142.

In *Saia v. New York*, 334 U.S. 558, 86 S.Ct. 1148, 92 L.Ed. 1574 (1948), a chief of police was authorized to issue permits for use of loudspeakers or amplifiers on city streets, but there were "no standards prescribed for the exercise of his discretion." *Id.*, 68 S.Ct. at 1149.

In *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 280 (1951), custom required obtaining a permit for public meetings in a park. However, there was "no ordinance or statute regulating or prohibiting the use of the park; all that there is here is an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served." *Id.*, 71 S.Ct. at 327.

In *Kunz v. New York*, 340 U.S 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951), a permit was required from the city police commissioner for public worship meetings under an ordinance in which "[t]here is no mention . . . of the reasons for which such a permit application can be refused." *Id.*, 71 S.Ct. at 314.

In *Staub v. City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958), a mayor and city council were permitted to deny a permit for solicitation of union membership "if they do not approve of the applicant or of the union or of the union's 'effects upon the general welfare of the citizens of the City of Baxley.' " *Id.*, 78 S.Ct. at 282.

In *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct.

734, 13 L.Ed.2d 649 (1965), motion pictures were required to be submitted to a censo. ship board for licensing before they could be shown. The board was authorized to "approve and license such film or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." *Id.*, 85 S.Ct. at 736.

In *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965), organizers of street meetings or parades on public streets were required to obtain a permit under a statute which "itself provides no standards for the determination of local officials as to which assembly to permit and which to prohibit." *Id.*, 85 S.Ct. at 465.

In *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), a commission was permitted to refuse a permit for parades, processions, or public demonstrations if in its judgment "the public welfare, peace, safety, health, decency, good order, morals, or convenience require that it be refused." *Id.*, 89 S.Ct. at 938.

Finally, in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), professional solicitors of charitable contributions were required to register before solicitation began "[a]nd the Secretary is to approve the professional fund raiser's registration only if she finds that the application is in conformity with the requirements of the subtitle as well as with the rules and regulations of the Secretary." *Id.*, 104 S.Ct. at 2853.[3]

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[3] Similarly, in *Cook County v. Renaissance Arcade*, 522 N.E.2d 73

Obviously, the ordinances and practices involved in these cases in which unbridled official discretion was found to exist are not analogous to and do not provide a legal basis upon which to invalidate the City of Kenner permit provisions.

In fact, the City of Kenner permit requirement does not give unbridled discretion to the City Council, but rather requires performance of a "ministerial, police routine" similar to that approved in *Pouplous v. State of New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953). When Section 23.02 is read in conjunction with Sections 15.02 and 16.02 of the Kenner Zoning Ordinance, unbridled discretion is not left in Kenner officials to approve or deny a permit application. In view of the stated purposes of the Comprehensive Zoning Ordinance (p. A-30, Petition for Writ of *Certiorari*), distance requirements and restriction of adult bookstores to Light or Heavy Industrial districts necessarily render provisions 1-4 of Section 23.02 self-fulfilling. Provision 5 requiring the City Council to ensure that the location for which the permit is sought has "adequate ingress and egress to property and proposed structures thereon with particular attention to vehicular and pedestrian safety and convenience, traffic flow and control, and access in case of fire," is neither vague nor indefinite. Rather, it sets precise standards for consideration of matters which are clearly substantial and valid concerns for the City of Kenner insofar as the location of any business is concerned.

The District Court erred in holding the permit provisions of the Comprehensive Zoning Ordinance of the City

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Footnote 3 continued.

(Ill. 1988), cited by the District Court, there were "no provisions in the ordinance setting standards or guidelines for the board of commissioners to follow in deciding whether to grant or deny special use permits."

of Kenner provides unbridled official discretion in reviewing permit applications for adult bookstores. Its conclusion is supported neither by analogy to the cases upon which the "unbridled discretion" rule is based, nor upon an analysis of the permit procedures in the factual circumstances presented by this case.

## CONCLUSION

For these reasons, Cross Petitioners request that the Cross Petition for Writ of *Certiorari* be granted to correct the District Court's erroneous determination that the permit requirement is invalid. Because the permit procedure satisfies the twofold requirements of *FW/PBS*, that part of the District Court's judgment striking the permit provision of Ordinance No. 6333 should be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned counsel certifies that copies of this Cross Petition for Writ of *Certiorari* has been served upon counsel for Petitioner/Cross Respondent, LaGrange Trading Company, d/b/a Airline Bookstore, through its attorney of record, Frierson M. Graves, Jr., Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, 2000 First Tennessee Building, Memphis, Tennessee, 38103, by United States mail, first class postage prepaid, on this 9th day of June, 1992.

C. Eugene Gauthier